

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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DONEALE FEAZELL,

Petitioner,

v.

RENEE BAKER, *et al.*,

Respondents.

Case No. 3:16-cv-00313-MMD-VPC

ORDER

This habeas matter comes before the Court for initial review under Rule 4 of the Rules Governing Section 2254 Cases as well as on petitioner's motion to file a longer than normal petition and motion for appointment of counsel. (Currently attachments to ECF No. 1.) The filing fee has been paid.

**I. BACKGROUND**

Petitioner Doneale Feazell challenges his Nevada state conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and attempted robbery with the use of a deadly weapon. Petitioner originally was sentenced to death, but he ultimately was sentenced to consecutive sentences of life without the possibility of parole. State court proceedings leading to or relating to petitioner's conviction and sentence were pending almost continuously over a 23-year period from early 1993 through early 2016.<sup>1</sup>

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<sup>1</sup>The preliminary procedural review outlined herein is based upon review of the available state court online docket records together with the available materials currently on file. The Court makes no findings of fact either as to the state court procedural history or other factual matters in the case, and the statements herein are subject to a later more comprehensive review based upon a more complete record.

1 The Supreme Court of Nevada affirmed petitioner's original judgment of conviction  
2 on November 30, 1995. *Feazell v. State*, 906 P.2d 727 (1995). It does not appear that  
3 petitioner sought *certiorari* review in the United States Supreme Court.

4 The Antiterrorism and Effective Death Penalty Act (AEDPA) became effective on  
5 April 24, 1996. The one-year limitation period in 28 U.S.C. § 2244(d) began running after  
6 this date as to convictions that had become final prior to this date, absent tolling, delayed  
7 accrual, or other considerations.<sup>2</sup>

8 It appears that petitioner filed a timely state post-conviction petition on October 16,  
9 1996.<sup>3</sup> A total of 174 days elapsed between the April 24, 1996, effective date of AEDPA  
10 and the date of filing, not including either date in the count.

11 Thereafter, on November 14, 2002, on appeal from the denial of state post-  
12 conviction relief, the Supreme Court of Nevada vacated petitioner's death sentence and  
13 remanded for a new penalty hearing. On remand, petitioner ultimately was sentenced on  
14 March 5, 2009, to two consecutive sentences of life without the possibility of parole. The  
15 Supreme Court of Nevada affirmed the second judgment of conviction on a second direct  
16 appeal on September 9, 2010, with the remittitur issuing on October 4, 2010.

17 As of that point, it appears that state proceedings subsequent to the initial direct  
18 review proceedings had been pending in one form or another continuously from October  
19 16, 1996, through October 4, 2010.

20 With regard specifically to the potential running of the federal limitation period, the  
21 time to file a petition for *certiorari* review in the United States Supreme Court following the  
22 order of affirmance on the second direct appeal expired on December 8, 2010.

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25 <sup>2</sup>See *Patterson v. Stewart*, 251 F.3d 1243, 1245-47 (9<sup>th</sup> Cir. 2001). Given the later  
26 proceedings in petitioner's case, the Court expresses no opinion on initial review as to  
27 whether the federal limitation period ran in his case with respect to the current federal  
petition during otherwise untolled time immediately following April 24, 1996.

28 <sup>3</sup>See ECF No. 1-1 at 4. All page record citations herein are to the electronic docket  
page number in the header, unless otherwise indicated.

1 A copy of a procedural recital from a state court filing included within the federal  
2 petition indicates the following. An attorney who had represented petitioner at the second  
3 penalty hearing and perhaps other prior proceedings filed a second state post-conviction  
4 petition on October 4, 2011. This date — one year from the issuance of the remittitur on  
5 the second direct appeal — likely represented the last possible date to file a timely state  
6 post-conviction petition following the appeal. The petition alleged ineffective assistance  
7 of counsel by the filing attorney, and she moved shortly thereafter to withdraw as counsel  
8 and for the appointment of conflict-free counsel. The state district court ultimately granted  
9 counsel's motions and allowed the petition to proceed over the State's objection.<sup>4</sup>

10 A total of 299 days elapsed between the December 8, 2010, expiration of the time  
11 to seek *certiorari* review and the October 4, 2011, filing of the second state petition,  
12 excluding both dates from the count.

13 Proceedings were pending continuously on the second state petition in the district  
14 court and thereafter the state supreme court through to the February 9, 2016, issuance  
15 of the remittitur concluding the appeal from the denial of state post-conviction relief.

16 After 113 days had elapsed following the issuance of the remittitur, on or about  
17 June 2, 2016, petitioner mailed the federal petition to the Clerk of this Court for filing.

## 18 **II. MOTION FOR APPOINTMENT OF COUNSEL**

19 The Court finds that the interests of justice require the appointment of counsel  
20 pursuant to 18 U.S.C. § 3006A(a)(2)(B). The Court finds that the interests of justice  
21 warrant such appointment given: (a) the consecutive sentences of life without the  
22 possibility of parole; (b) the likely complexity of the procedural and substantive issues in  
23 a case that has been litigated in the state courts nearly continuously for over 23 years,  
24 with the case being litigated as a capital murder case for approximately 16 of those years;  
25 and (c) in particular, the potentially complex legal and factual issues attending the  
26 application of the federal limitation period in this case, including, *inter alia*, (i) potential

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27 <sup>4</sup>See ECF No. 1-1 at 5. The statements of fact herein, again, are preliminary and  
28 subject to a comprehensive review on a more complete record.

1 issues regarding the running of the limitation period during the interim following the first  
2 direct appeal and AEDPA's effective date, given the subsequent proceedings; and (ii)  
3 possible issues relating to whether petitioner had adequate, conflict-free representation  
4 in the period following the second direct appeal.

5 The Court further finds based upon the financial attachments submitted with the  
6 pauper application that, while the application was denied, petitioner nonetheless is  
7 financially eligible for the appointment of counsel. The Court reserves the option,  
8 however, based upon said materials, of potentially requiring petitioner to contribute to the  
9 costs of his representation pursuant to § 3006A(f). See ECF No. 5. Respondents will be  
10 directed to submit a periodic status report with a copy of petitioner's inmate account  
11 statement for the prior six months. *Cf. United States v. Waldron*, No. 07-10117, at \*\*2 (9<sup>th</sup>  
12 Cir., Mar. 14, 2008) (contribution appropriate also where representation is by the Federal  
13 Public Defender); *Ybarra v. Wolff*, 571 F.Supp. 209 (D. Nev. 1983) (government counsel  
14 generally should conduct the initial investigation and presentation regarding the  
15 petitioner's potential financial resources).

### 16 **III. CONCLUSION**

17 It is therefore ordered that petitioner's motion to file a longer than normal petition  
18 is granted, the Clerk of Court will file the petition and motion, and the Clerk will reflect the  
19 grant of the motion by this order.<sup>5</sup>

20 It is further ordered that petitioner's motion for appointment of counsel is granted  
21 and the Clerk will both file the motion and reflect the grant of the motion by this order. The  
22 counsel appointed will represent petitioner in all federal proceedings related to this matter,  
23 including any appeals or *certiorari* proceedings, unless allowed to withdraw.

24 It is further ordered that the Federal Public Defender will be provisionally appointed  
25 as counsel and will have thirty (30) days to undertake direct representation of petitioner  
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27 <sup>5</sup>The filing of the petition does not signify that the petition is free of deficiencies.  
28 The Court simply is directing the filing of the original *pro se* petition as a ministerial matter  
in anticipation of the filing of a counseled amended petition.


1 or to indicate the office's inability to represent petitioner. If the Federal Public Defender is  
2 unable to represent petitioner, the Court then will appoint alternate counsel. A deadline  
3 for the filing of an amended petition and/or seeking other relief will be set after counsel  
4 has entered an appearance. Based upon the initial review conducted, the Court  
5 anticipates setting the deadline for approximately one hundred fifty (150) days from entry  
6 of the formal order of appointment. Any deadline established and/or any extension thereof  
7 will not signify any implied finding of a basis for tolling during the time period established.

8 It is further ordered, so that the respondents may be electronically served with any  
9 papers filed through counsel, that the Clerk add state attorney general Adam P. Laxalt as  
10 counsel for respondents and make informal electronic service of this order upon  
11 respondents by directing a notice of electronic filing to him. Respondents' counsel will  
12 enter a notice of appearance within twenty-one (21) days of entry of this order.

13 It is further ordered that respondents, until further order, must file, at successive  
14 one hundred eighty (180) day intervals following the notice of appearance, a status report  
15 with a copy of petitioner's inmate account statement for the prior six months. Respondents  
16 may accompany the status report with a motion regarding potential contribution to  
17 defense costs if they so choose. No further response will be required from respondents  
18 until further order.

19 The Clerk will send a copy of this order to the *pro se* petitioner (along with a copy  
20 of the papers that he submitted), the Nevada Attorney General, the Federal Public  
21 Defender, and the CJA Coordinator for this division. The Clerk further will provide copies  
22 of all prior filings herein to both the Attorney General and the Federal Public Defender in  
23 a manner consistent with the Clerk's current practice, such as regeneration of notices of  
24 electronic filing.

25 DATED THIS 27<sup>th</sup> day of December 2016.

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28 MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE